Supreme Court
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY D. LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Voting Rights Act, 42 U.S.C. § 1973, which prohibits voter disqualification based on race or color, allows an individual to challenge a state law that disenfranchises individuals based upon a felony conviction.

PARTIES

The parties to the proceeding below were:

Petitioners: Gary Locke, Governor of the State of Washington; Sam Reed, Secretary of State of the State of Washington; and the State of Washington. Petitioners were aligned as defendants/appellees below.

Respondents: Muhammad Shabazz Farrakhan, Al Kareem Shadeed, Ramon Barrientes, Clifton Briceno, Marcus Price, and Timothy Schaaf. Respondents were aligned as plaintiffs/appellants below.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT 3

A. Felon Disenfranchisement In Washington 4

B. Procedural History 6

REASONS FOR GRANTING THE PETITION 11

A. There Is A Conflict In The Circuits About Whether the Voting Rights Act Applies To State Felon Disenfranchisement Laws 12

B. The Ninth Circuit's Decision Is Inconsistent With This Court's Decisions Requiring A Clear Statement Of Congress' Intent To Alter The Usual Constitutional Powers Of The States 17

C. This Case Presents An Important National Question 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Baker v. Pataki,
85 F.3d 919 (2nd Cir. 1996) 16

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) ... 10, 11

Chisom v. *Roemer*,
501 U.S. 380 (1980) 20

City of Mobile v. Bolden,
446 U.S. 55 (1980) 19

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 23

Farrakhan v. Locke,
987 F. Supp. 1304 (E.D. Wash. 1997) 1

Farrakhan v. Washington,
338 F.3d. 1009 (9th Cir. 2003) 1

Farrakhan v. Washington,
359 F.3d 1116 (9th Cir. 2004) 1

Gregory v. Ashcroft,
501 U.S. 452 (1991) 6, 7, 17

Hunter v. Underwood,
471 U.S. 222 (1985) 4, 11

Johnson v. Governor of the State of Florida,
353 F.3d 1287 (11th Cir. 2003)
(petition for rehearing pending) 12, 13, 16

Kimel v. Florida Board of Regents,
528 U.S. 62 (2002) 10, 11

Muntaqim v. Coombe, No. 01-7260, 2004 WL
870474 (2nd Cir. April 23, 2004) 14, 15, 16

Richardson v. Ramirez,
418 U.S. 24 (1974) 4, 7, 17

Rooker v. Fidelity Trust Co.,
263 U.S. 413 (1923) 23

Smith v. Phillips,
455 U.S. 209 (1982) 23

Thornburg v. Gingles,
78 U.S. 30 (1986) 4

United States v. Lopez,
514 U.S. 549 (1995) 22

Wesley v. Collins,
605 F. Supp. 802 (M.D. Tenn. 1985) 14

Wesley v. Collins,
791 F.2d 1255 (6th Cir. 1986) 13

Statutes

2001 Mass. Acts ch. 150 21

2003 Wash. Laws III, § 2405 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 15483(a)(2)(A)(ii)(I) 20

42 U.S.C. § 1973 6

42 U.S.C. § 1973(a) 3, 19

42 U.S.C. § 1973(b) 3, 20

42 U.S.C. § 1973a[b] 18

42 U.S.C. § 1973b[c] 18

42 U.S.C. § 1973gg-6(a)(3) 20

42 U.S.C.§ 1973gg-6(g) 5

Ala. Code § 17-3-10 21

Alaska Admin. Code § 15.60.010(7) 21

Ariz. Rev. Stat. Ann. § 16-101(A)(5) 21

Colo. Rev. Stat. Ann. § 1-2-103 21

Conn. Gen. Stat. § 9-46 21

Del. Code Ann. tit. 15, § 6101 21

Del. Code Ann. tit. 15, § 6102 21

Del. Code Ann. tit. 15, § 6103 21

Del. Code Ann. tit. 15, § 6104 21

Del. Code Ann. tit. 15, § 6105 21

Del. Code Ann. tit. 15, § 6106 21

Del. Code Ann. tit. 15, § 6107 21

Fla. Stat. Ann. ch. IX, pt. II, § 97.041 21

Ga. Code Ann. tit. 21, § 21-2-216(b) 21

Haw. Rev. Stat. ch. 831, § 831-2 21

Idaho Code tit. 18, § 18-310 21

Ill. Rev. Stat. ch. 10, art. 3 21

Ind. Code Ann. § 3-7-13-4 21

Iowa Code tit. II, § 48A.6 21

Kan. Stat. Ann. ch. 21, § 21-4615 21

Ky. Rev. Stat. Ann. § 116.113 21

La. Rev. Stat. Ann. tit. 18, § 102 21

Md. Code Ann. tit. 3, § 3-102 21

Mich. Comp. Laws Ann. § 168.758 21

Minn. Stat. Ann. § 201.014 21

Mo. Ann. Stat. ch. 115, § 115.133 21

N.C. Gen. Stat. § 13-1 21

N.C. Gen. Stat. ch. 163, § 163-55 21

N.D. Cent. Code tit. 12.1, ch. 12.1-33, § 12.1-33-01 21

N.H. Rev. Stat. Ann. ch. 607, § 607-A:2 21

N.M. Stat. Ann. ch. 31, art. 13, § 31-13-1 21

Neb. Rev. Stat. § 32-313 21

Nev. Rev. Stat. Ann. art. 2, § 1 21

Ohio Rev. Code Ann. tit. XXIX, ch. 2961, § 2961.01 21

Okla. Stat. Ann. tit. 26, § 4-101 21

Or. Rev. Stat. § 137.281 21

Pa. Con. Stat. Ann. tit. 25, § 1301 21

Pa. Election Code § 102(w), art. I, § 2602 21

S.C. Code Ann. § 7-5-120 21

Tenn. Code Ann. § 40-20-112 21

Tex. Elec. Code Ann. § 11.002(4) 21

Va. Code Ann. § 24.2-409 21

Va. Code Ann. § 24.2-418 21

Va. Code Ann. § 24.2-427 21

Wash. Rev. Code § 10.64.021 5

Wash. Rev. Code § 29.01.080 5

Wash. Rev. Code § 29.10.097 ..... 2, 5

Wash. Rev. Code § 29A.04.079 4

Wash. Rev. Code § 29A.08.520 ..... 2, 5

Wash. Rev. Code § 9.94A.190(1) 5

Wash. Rev. Code § 9.94A.637 5

Wash. Rev. Code § 9.94A.875 5

Wash. Rev. Code § 9.96.010 5

Wash. Rev. Code § 9.96.050 5

Wash. Rev. Code § 9A.04.040(2) 5

Wash. Terr. Law of 1866 (Rem. & Bal. Code, § 4755) 4

Wis. Stat. Ann. § 6.03(1)(b) 21

Wyo. Stat. tit. 22, ch. 1, § 22-1-102 21

Other Authorities

Developments in the Law:One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939 (2002) 22

Extension of the VRA, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982) (1982 Senate Hearings) 20

House Report No. 89-439 (1965) ("1965 House Report"), *reprinted in* U.S. Code Cong. & Admin. News 1965 18

Senate Report No. 89-162 (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 1965 19

Senate Report No. 97-417 ("1982 Senate Report"), *reprinted in* U.S. Code Cong. & Admin. News 1982 ..... 19, 20

Constitutional Provisions

Ala. Const. § 182 21

Alaska Const. art. V, § 2 21

Ariz. Const. art. VII, § 2 21

Ark. Const. Amend. 51, § 11(a)(4) 21

Cal. Const. art. II, § 4 21

Colo. Const. art. VII, § 1 21

D.C. Const. art. V, § 1 21

Del. Const. art. V, § 2 21

Fla. Const. art. VI, § 4 21

Ga. Const. art. II, § 1 21

Haw. Const. art. II, § 2 21

Idaho Const. art. VI, § 3 21

Ill. Const. art. III, § 2 21

Ind. Const. art. 2 21

Iowa Const. art. II, § 5 21

Ky. Const. § 145 21

La. Const. art. I, § 10 21

Mass. Const. amend. art. 120 21

Md. Const. art. I, § 4 21

Mich. Const. art. II, § 2 21

Minn. Const. art. VII, § 1 21

Miss. Const. art. 12, § 241 21

Mont. Const. art. IV, § 2 21

N.C. Const. art. VI, § 2 21

N.C. Const. art. VI, § 8 21

N.D. Const. art. II, § 2 21

N.J. Const. art. II, § I 21

N.Y. Const. art. II, § 3 21

Neb. Const. art. VI, § 2 21

Or. Const. art. II, § 3 21

R.I. Const. art. II, § 1 21

S.D. Const. § 2 21

Tenn. Const. art. IV, § 2 21

Tex. Const. art. VI, § 1 21

U.S. Const. amend. XIV, § 2 17

Utah Const. art. IV, § 6 21

Va. Const. art. II, § 1 21

W. Va. Const. art. IV, § 1 21

Wash. Const. amend. 83 4

Wash. Const. art. VI, § 3 ..... 2, 4

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Governor Gary Locke, Secretary of State Sam Reed, and the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 338 F.3d. 1009. App. 1a. The court's order denying the petition for rehearing and rehearing en banc and a dissent from the denial of rehearing en banc are published at 359 F.3d 1116. App. 29a. The order of the United States District Court for the Eastern District of Washington granting petitioners' motion for summary judgment and denying respondents' motion for summary judgment is unpublished. App. 54a. The district court's order granting in part and denying in part petitioners' motion to dismiss is published at 987 F. Supp. 1304. App. 67a.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2003. App. 1a. On February 24, 2004, the court issued an order denying a timely petition for rehearing and rehearing *en banc*. App. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." App. 91a. Section 2 of the Fourteen Amendment provides in part:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote . . . is denied to any of the male inhabitants of such state . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." App. 91a (emphasis added).

The Washington Constitution article VI, § 3 provides in part that "[a]ll persons convicted of infamous crime unless restored their civil rights . . . are denied the elective franchise." App. 93a. Wash. Rev. Code § 29A.08.520 (formerly Wash. Rev. Code § 29.10.097)[1] provides in part: "Upon receiving official

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[1] Effective July 1, 2004, Washington's election statutes are recodified into a new Title 29A. 2003 Wash. Laws III, § 2405. Because all citations to these statutes in decisions below and in the record are to the former codification, the former citation is provided parenthetically following each citation.

notice of a person's conviction of a felony . . . if the convicted person is a registered voter in the county, the county auditor shall cancel the defendant's voter registration." App. 99a. Other relevant Washington statutes are set out in the appendix. App. 93a-100a.

The Voting Rights Act (VRA), 42 U.S.C. § 1973(a), provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen to vote on account of race or color . . . ." App. 92a. 42 U.S.C. § 1973(b) provides in part that a "violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." App. 92a. Other relevant provisions of the VRA are set out in the appendix. App. 92a.

STATEMENT

Washington is one of 48 states that imposes some form of voter disqualification on felons.[2] Section 2 of the Fourteenth Amendment expressly permits states to disenfranchise felons, unless the disqualification is the result of purposeful racial

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[2] For a list of the relevant state law provisions see note 5 *infra* p. 21.

discrimination. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). In contrast to the Fourteenth Amendment, a violation of the Voting Rights Act may be established by the totality of the circumstances. It is not necessary to prove that the election law was designed or maintained for a discriminatory purpose. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986). The question presented in this case is whether Congress intended the Voting Rights Act to apply to felon disenfranchisement.

A. Felon Disenfranchisement In Washington

1. Washington has disenfranchised felons since it was a territory. Wash. Terr. Law of 1866 (Rem. & Bal. Code, § 4755) ("No . . . persons convicted of an infamous crime, shall be entitled to the privilege of an elector."). When Washington became a state in 1889, felon disenfranchisement was written into the state constitution. Article VI, § 3 provided that: "All . . . persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise."[3] The two provisions were essentially the same - except that the constitution provided for the restoration of civil rights.

Under Washington law, an infamous crime is defined as "a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility." Wash. Rev. Code § 29A.04.079 (formerly

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[3] In 1988 the language of article IV, section 3 was amended to read: "All persons convicted of infamous crime, unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise." Wash. Const. amend. 83. App. 93a.

Wash. Rev. Code § 29.01.080). App. 99a. Criminal sentences longer than a year must be served in a state correctional facility. Wash. Rev. Code § 9.94A.190(1). App. 94a. This essentially equates an "infamous crime" with any felony. Wash. Rev. Code § 9A.04.040(2). Upon conviction in state court, the clerk of the sentencing court must notify the county auditor of the conviction. Wash. Rev. Code § 10.64.021. App. 99a. If the conviction occurs in federal court, the United States Attorney is required by federal law to provide similar notice. 42 U.S.C. § 1973gg-6(g). Upon receipt of the notice of conviction in either state or federal court, "if the convicted person is a registered voter in the county, the county auditor shall cancel the defendant's voter registration." Wash. Rev. Code § 29A.08.520 (formerly Wash. Rev. Code § 29.10.097). App. 99a.

2. Washington statutes provide for the reinstatement of civil rights of felons under several provisions. A felon sentenced under state determinate sentencing laws receives a certificate of discharge after completing all sentence elements. Wash. Rev. Code § 9.94A.637. App. 95a-97a. The civil rights of a felon sentenced under the prior indeterminate sentencing laws are restored upon discharge by the indeterminate sentencing review board. Wash. Rev. Code § 9.96.050. App. 97a-98a. Civil rights can also be restored through gubernatorial pardon. Wash. Rev. Code § 9.96.010. App. 97a. The clemency and pardons board also has the authority to restore the voting rights of any felon convicted in federal court or in an out-of-state court, whether or not the convicting jurisdiction has restored civil rights. Wash. Rev. Code § 9.94A.875.

B. Procedural History

1. Respondents Muhammad Shabazz Farrakhan, Al Kareem Shadeed, Ramon Barrientes, Clifton Briceno, Marcus Price, and Timothy Schaaf, are African-American, Hispanic-American and Native-American felons, either released from or still serving prison sentences entered against them in the Washington superior courts. All of their convictions are final and none of them raised any issue of race as a basis to challenge their conviction at trial, in direct appeal, or in any collateral challenge to their judgment and sentence. All of them have been disenfranchised, and none of them has had his civil rights restored.

2. Respondents filed an action in the United States District Court for the Eastern District of Washington against the Governor and Secretary of State of the State of Washington (the State). They claimed that Washington's felon disenfranchisement violated the Voting Rights Act, 42 U.S.C. § 1973, because it both denied the right to vote and had the impact of diluting minority voting strength. Respondents also claimed violations of the First, Fourth, Fifth, Sixth, Ninth, Fourteenth, and Fifteenth Amendments of the United States Constitution.

The State moved to dismiss the complaint for failure to state a claim. With regard to the Voting Rights Act claim, the State argued that Congress did not intend the Act to apply to felon disenfranchisement and that such an application would violate the plain statement rule set out by this Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Under that rule, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The district court rejected this argument concluding that the plain statement rule does not apply to the Voting Rights Act. App. 74a. The district court reasoned that the "Supreme Court has consistently recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the VRA, despite the burdens those measures placed on the states." App. 74a (internal punctuation omitted). Therefore, because "these amendments, on which the VRA is based, altered the federal-state balance of power as contemplated by the original constitution, the 'plain statement' rule is simply inapplicable in the context of the VRA." App. 74a. Having concluded that the Voting Rights Act applies to felon disenfranchisement, the district court held that respondents had alleged sufficient facts to state a claim for vote denial under the VRA but not for voter dilution. App. 84a; App. 86a. The district court dismissed respondents' constitutional claims.

With regard to the Fourteenth and Fifteenth Amendments, the court noted that *Richardson*, 418 U.S. 24, held that felon disenfranchisement was

permitted under Section 2 of the Fourteenth Amendment. Thus, discriminatory intent must be purposeful. The court held that respondents' complaint failed to state a claim because it only alleged circumstantial evidence to establish that discrimination was the motivating factor behind Washington's felon disenfranchisement law. App. 86a-87a. The court dismissed the remaining constitutional claims because it would be inconsistent to interpret Section 2 of the Fourteenth Amendment as permitting felon disenfranchisement while concluding that another constitutional provision prohibited it. App. 87a-88a.

After the district court ruled on the motion to dismiss, respondents filed an amended complaint that continued to assert a vote denial theory under the Voting Rights Act, but abandoned their vote dilution claim and their constitutional claims. Respondents also claimed that Washington's procedure for restoring civil rights violated the VRA. The parties filed cross-motions for summary judgment. The district court found respondents failed to present a triable issue of vote denial under the VRA and granted summary judgment for the State. Despite having concluded that the VRA applies to felon disenfranchisement laws, the district court held "that the totality of the circumstances does not establish the requisite causal link between Washington's felon disenfranchisement provision and reduced minority access to Washington's political process." App. 64a. The district court also concluded that respondents "failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting

mechanism. If the court concluded that such evidence was sufficient to establish causation, it would effectively broaden the VRA to provide a remedy for societal discrimination outside the context of voting." App. 59a-60a. The district court also held that respondents presented no evidence of "history of official discrimination in the state . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." App. 60a. The district court dismissed respondents' challenge to Washington's procedures to restore civil rights because they failed to present any evidence of discrimination. The district court also held that respondents lacked standing to challenge these procedures because none of them had attempted to have their civil rights restored. App. 65a.

3. Respondents appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit began by affirming the district court's holding that the Voting Rights Act applies to felon disenfranchisement. App. 13a ("As a preliminary matter, we agree with the district court that [respondents'] claim of vote denial is cognizable under Section 2 of the VRA."). However, unlike the district court, the Ninth Circuit did not discuss the application of the plain statement rule to the Voting Rights Act.

The court of appeals reversed the district court's holding that respondents failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting mechanism. The Ninth Circuit held that this was the wrong test and that "racial bias in the criminal

justice system may very well interact with voter disqualification to create the kinds of barriers to political participation on account of race that are prohibited by the VRA rendering it simply another relevant social and historical condition to be considered where appropriate." App. 22a. While expressing no opinion on the merits of respondents' claim, the Ninth Circuit remanded the case to the district court to evaluate the totality of the circumstances, including evidence of racial bias in Washington's criminal justice system. App. 23a. The Ninth Circuit also affirmed the district court's dismissal of the challenge to Washington's procedures to restore civil rights.

4. The state filed a timely motion for rehearing and rehearing *en banc*. Both motions were denied. However, seven judges dissented from the decision to deny rehearing *en banc*. A strongly worded dissent written by Judge Alex Kozinski concluded that "the VRA was never intended to reach felon disenfranchisement laws." App. 38a. Judge Kozinski reviewed the legislative history of the VRA and concluded that it was "crystal clear that felon disenfranchisement wasn't one of the practices Congress was concerned about." App. 40a. The dissent also concluded that the panel decision was inconsistent with this Court's decisions in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2002).

In *Garrett* and *Kimel*, the Court held that Congress must make findings establishing a pattern of unconstitutional conduct by the states before

Congress can exercise its authority under Section 5 of the Fourteenth Amendment. According to the dissent, "Congress could legitimately remedy *Hunter*-type[4] violations but it would have to have evidence that states were using felon disenfranchisement in a purposeful, invidious manner." App. 44a. Judge Kozinski expressed concern that in light of this Court's decisions in *Garrett* and *Kimel* and broadly applying the VRA to felon disenfranchisement "seriously jeopardizes its constitutionality." App. 41a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for two important reasons. First, there is significant conflict among the circuits as to whether Congress intended the Voting Rights Act to apply to felon disenfranchisement laws. Second, the case involves an important national question. Forty eight states have some form of felon disenfranchisement—so this case has ramifications far beyond the State of Washington. In addition, applying the VRA to felon disenfranchisement has significant implications for the criminal justice system. The VRA is not a vehicle to review a state's criminal justice system. Allowing for such a review through the VRA could significantly affect the relationship between the states and the federal government.

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[4] *Hunter v. Underwood*, 471 U.S. 222 (1985).

A. There Is A Conflict In The Circuits About Whether the Voting Rights Act Applies To State Felon Disenfranchisement Laws

1. There is a direct conflict between the Ninth and Eleventh Circuits and the Second Circuit over the application of the Voting Rights Act to felon disenfranchisement. The Ninth and Eleventh Circuits held—over vigorous dissents—that the VRA applies to felon disenfranchisement. The Second Circuit holds that it does not. There is also a substantial tension between the Sixth Circuit and the Second Circuit on this issue because the Sixth Circuit assumes that the VRA applies. The Court should grant review to resolve this conflict.

2. In the decision below, the Ninth Circuit held—with virtually no analysis—that respondents' "claim of vote denial is cognizable under Section 2 of the VRA." App.13a. The seven judges dissenting from the denial of rehearing *en banc* in the Ninth Circuit strongly disagreed. App. 47a. ("It is unlikely that Congress could have reached felon disenfranchisement even if it wanted to, at least not without a substantial evidentiary record and a more tailored remedy. In interpreting the VRA to reach felon disenfranchisement in a state without a history of race discrimination like Washington, the panel has created a constitutional problem that Congress itself avoided.")

The Eleventh Circuit reached the same conclusion in *Johnson v. Governor of the State of Florida*, 353 F.3d 1287 (11th Cir. 2003) (petition for rehearing pending). In *Johnson*, the plaintiffs challenged Florida's felon disenfranchisement under

the Voting Rights Act. The majority held that the VRA applies to felon disenfranchisement. *Johnson*, 353 F.3d at 1306 n.7 ("although Congress might not be able to ban all state criminal disenfranchisement laws, it may certainly exercise the power granted to it under Section 5 of the Fourteenth Amendment to enforce statutorily the constitutional prohibition against racially discriminatory criminal disenfranchisement"). Judge Phyllis A. Kravitch dissented. In her view, Congress did not intend the VRA to apply to felon disenfranchisement. *Id.* at 1316 ("For the majority's analysis of the Voting Rights Act to be correct, we must look for a clear statement from Congress that it intended such a constitutionally-questionable result. Instead of a clear statement from Congress that the majority's interpretation was intended, the legislative history indicates just the opposite-that Congress did not intend the Voting Rights Act to apply to felon disenfranchisement provisions") (citation and footnote omitted). Further, like the dissenters in the Ninth Circuit, Judge Kravitch expressed concern that "the majority's interpretation creates a serious constitutional question by interpreting the Voting Rights Act to trump the text of the Fourteenth Amendment." *Id.* at 1315.

The Sixth Circuit has not expressly ruled that the VRA applies to felon disenfranchisement. However, in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), the court of appeals assumed that the VRA applied. *Wesley* also involved a challenge to the state felon disenfranchisement law by a convicted felon. The district court began by discussing the Voting Rights Act. It concluded that "Section 2 is a

constitutional exercise of congressional authority under the enforcement clauses of the Fourteenth and Fifteenth Amendments." *Wesley v. Collins*, 605 F. Supp. 802, 808 (M.D. Tenn. 1985). The district court went on to dismiss the case because the plaintiff's complaint failed to establish a connection between discriminatory exclusion of blacks from the political process and felon disenfranchisement. *Id.* at 812. On appeal, the Sixth Circuit affirmed the district court's conclusion that the plaintiff failed to establish this causal connection. The court did not discuss the application of the VRA to felon disenfranchisement but its decision assumed that the Voting Rights Act applied.

3. In contrast to the Ninth, Eleventh and (by implication) Sixth Circuits, the Second Circuit concluded that the Voting Rights Act does not apply to felon disenfranchisement. In *Muntaqim v. Coombe*, No. 01-7260, 2004 WL 870474 (2nd Cir. April 23, 2004). The Second Circuit held that the VRA "would alter the constitutional balance between the States and the Federal Government if it were construed to extend to state felon disenfranchisement statutes". *Muntaqim*, 2004 WL 870474, at *23. Thus in "absence of a clear statement from Congress to support that construction of the statute, we hold that [the VRA] does not extend to [felon disenfranchisement]." *Id.*

With regard to altering the constitutional balance, the court found that "felon disenfranchisement statutes cannot be conflated with other facially neutral voting rules that might fall within the ambit of [the VRA]." This was so for

two reasons. "First, it is indisputable that under our federal system, the States possess primary authority for defining and enforcing the criminal law." *Id.* at *16 (citation and internal punctuation omitted). Second, "the states have the primary responsibility for regulating the times, places, and manner of conducting federal elections under U.S. Const. art. I, § 4, cl. 1, and even more obviously for regulating elections to state office." *Id.* (citation and internal punctuation omitted). Thus, "[i]f New York State uses disenfranchisement as a tool to punish people who violate its laws, the application of [the VRA] to [felon disenfranchisement] would upset the sensitive relation between federal and state criminal jurisdiction." *Id.* (internal punctuation omitted).

The court also relied on the fact that "a State's discretion to deny the vote to convicted felons is fixed by the text of § 2 of Fourteenth Amendment" and that "there is a longstanding practice in this country of disenfranchising felons as a form of punishment." *Id.* at *16, *17 (internal punctuation omitted). The Second Circuit concluded that there was no plain statement because the legislative history of the VRA establishes that "the only consideration of felon disenfranchisement statutes in the entire history of the Voting Rights Act is Congress' explicitly announced intention to exclude such statutes from the § 1973b(c) tabulation of prohibited tests and devices." *Id.* at *19 (citation and internal punctuation omitted).

4. The conflict between the circuits is actual and substantial. The Second Circuit recognized that its decision was in conflict with the Ninth Circuit in the

decision below and with the Eleventh Circuit's decision in *Johnson*. *Id.* at *8 ("In *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), a panel of the Ninth Circuit, like the Eleventh Circuit, held that a claim of vote denial based on Washington State's felon disenfranchisement scheme is cognizable under [the VRA]."); *Id.* at *7. (In *Johnson*, "a divided panel of the Eleventh Circuit, over a dissent by Judge Phyllis A. Kravitch, reinstated claims that the felon disenfranchisement provision of the Florida Constitution violates [the VRA].") Moreover, this issue is a particularly difficult one. The Ninth and Eleventh Circuit's decisions were accompanied by strong dissents. Additionally, in an earlier decision of the Second Circuit, *Baker v. Pataki*, 85 F.3d 919 (2nd Cir. 1996), the court, sitting *en banc*, split evenly on the question of whether the Voting Rights Act applies to felon disenfranchisement. Five judges concluded that it did, and five judges concluded that it did not.

5. This case presents a good vehicle to decide whether the Voting Rights Act applies to felon disenfranchisement. Since respondents abandoned their constitutional claims, the only issue before the Court is whether the VRA applies. Given the split in the circuits and the disagreement within the circuits, this Court should grant review. As the Second Circuit concluded in *Muntaqim* "this panel believe[s] that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court." *Muntaqim*, 2004 WL 870474, at *23.

B. The Ninth Circuit's Decision Is Inconsistent With This Court's Decisions Requiring A Clear Statement Of Congress' Intent To Alter The Usual Constitutional Powers Of The States

1. Congress did not intend to apply the Voting Rights Act to state felon disenfranchisement laws. The Ninth Circuit's contrary conclusion ignores the legislative history of the VRA and is inconsistent with this Court's decisions on the relations between the states and the federal government. When Congress seeks to alter the "usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460.

2. The decision below ignores this principle. The Constitution permits states to disenfranchise persons convicted of "participation in rebellion, or other crimes." U.S. Const. amend. XIV, § 2. This Court recognized in *Richardson*, 418 U.S. at 55-56, following an extensive review of state felon disenfranchisement laws, that Section 2 of the Fourteenth Amendment expressly allows states to deny the elective franchise to felons, including those who have completed their sentence and parole. *Id.* Although Section 2 of the Fourteenth Amendment authorizes felon disenfranchisement, there is no plain statement in the Voting Rights Act that Congress intended to apply the Act to felon disenfranchisement.

3. The Voting Rights Act of 1965 was "designed primarily to enforce the Fifteenth Amendment to the

Constitution of the United States and . . . also designed to enforce the Fourteenth Amendment and article I, section 4." House Report No. 89-439 (1965) ("1965 House Report"), *reprinted in* U.S. Code Cong. & Admin. News 1965, p. 2437. This Act was designed to address various exclusionary practices (i.e., literacy tests) in certain regions of the nation (referred to as covered areas) that were designed to prevent African-Americans from voting. The 1965 Act referred to such tests or devices as:

> "[A]ny requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b[c].

Outside covered areas, the 1965 Act barred application of tests or devices that had "been used . . . for the purpose *or with the effect* of denying or abridging the right of any citizen of the United States to vote on account of race or color, ..." 42 U.S.C. § 1973a[b] (emphasis added). Despite Congress' broader use of language to include situations where the "effect" was present, it was not the intent of Congress for the 1965 Act to apply to felony disenfranchisement, as evidenced in the 1965 Senate Report:

> "The third type of test or device covered is any requirement of good moral character. *This*

> *definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.* It applies where lack of good moral character is defined in terms of conviction of lesser crimes." Senate Report No. 89-162 (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 1965, p. 2562 (emphasis added).

A similar exemption was described in the 1965 House Report. *See* 1965 House Report, *reprinted in* 1965 U.S. House Code. Cong. & Admin. News at 2457 (the Act "does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability").

4. Congress amended Section 2 of the VRA in 1982 to legislatively overturn this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Bolden* held that proof of discriminatory intent was required as a prima facie evidence under the VRA. *See* Senate Report No. 97-417, pp. 2, 18-19 ("1982 Senate Report"), *reprinted in* U.S. Code Cong. & Admin. News 1982, pp. 179, 195-96. The 1982 amendments also prohibited any voting qualification imposed "in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a). These amendments also added that a violation "is established if, based on the totality of the circumstances, it is shown that the political processes leading to the nomination or election in the State . . . are not equally open to

participation by" racial minorities. 42 U.S.C. § 1973(b).

Congress did not change the scope of the coverage of the VRA in 1982. *Chisom* v. *Roemer*, 501 U.S. 380, 384 (1980). There is no record that in 1982, Congress suddenly changed the intent of the VRA laid down in 1965, to apply the VRA to felons. *See, e.g.*, 1982 Senate Report at 27, *reprinted in* 1982 U.S.C.C.A.N., p. 204; *Extension of the VRA, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States Senate,* 97th Cong., 2d Sess. (January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982) (1982 Senate Hearings) .

5. In fact, since passage and amendment of the VRA, Congress has only confirmed its approval of the disenfranchisement of felons in the 1993 National Voter Registration Act by specifically listing the conviction of a felony as one of a limited group of reasons justifying cancellation of a voter's registration. *See* 42 U.S.C. § 1973gg-6(a)(3). Even more recently, Congress enacted the Help America Vote Act of 2002, which requires that state voter registration databases coordinate with state agency records on felon status for the purpose of purging registration lists of felons. *See* 42 U.S.C. § 15483(a)(2)(A)(ii)(I).

C. This Case Presents An Important National Question

1. This case presents an important national question for two reasons. First, 48 states—every state but Vermont and Maine—have some form of

felon disenfranchisement.[5] Throughout our nation's

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[5] Ala. Const. § 182; Ala. Code § 17-3-10; Alaska Const. art. V, § 2; Alaska Admin. Code § 15.60.010(7); Ariz. Const. art. VII, § 2; Ariz. Rev. Stat. Ann. § 16-101(A)(5); Ark. Const. amend. 51, § 11(a)(4); Cal. Const. art. II, § 4; Colo. Const. art. VII, § 1; Colo. Rev. Stat. Ann. § 1-2-103; Conn. Gen. Stat. § 9-46; Del. Const. art. V, § 2; Del. Code Ann. tit. 15, § 6101; Del. Code Ann. tit. 15, § 6102; Del. Code Ann. tit. 15, § 6103; Del. Code Ann. tit. 15, § 6104; Del. Code Ann. tit. 15, § 6105; Del. Code Ann. tit. 15, § 6106; Del. Code Ann. tit. 15, § 6107; D.C. Const. art. V, § 1; Fla. Const. art. VI, § 4; Fla. Stat. Ann. ch. IX, pt. II, § 97.041; Ga. Const. art. II, § 1; Ga. Code Ann. tit. 21, § 21-2-216(b); Haw. Const. art. II, § 2; Haw. Rev. Stat. ch. 831, § 831-2; Idaho Const. art. VI, § 3; Idaho Code tit. 18, § 18-310; Ill. Const. art. III, § 2; Ill. Rev. Stat. ch. 10, art. 3; Ind. Const. art. 2; Ind. Code Ann. § 3-7-13-4; Iowa Const. art. II, § 5; Iowa Code tit. II, § 48A.6; Kan. Stat. Ann. ch. 21, § 21-4615; Ky. Const. § 145; Ky. Rev. Stat. Ann. § 116.113; La. Const. art. I, § 10; La. Rev. Stat. Ann. tit. 18, § 102; Md. Const. art. I, § 4; Md. Code Ann. tit. 3, § 3-102; Mass. Const. amend. art. 120; 2001 Mass. Acts ch. 150; Mich. Const. art. II, § 2; Mich. Comp. Laws Ann. § 168.758; Minn. Const. art. VII, § 1; Minn. Stat. Ann. § 201.014; Miss. Const. art. 12, § 241; Mo. Ann. Stat. ch. 115, § 115.133; Mont. Const. art. IV, § 2; Neb. Const. art. VI, § 2; Neb. Rev. Stat. § 32-313; Nev. Rev. Stat. Ann. art. 2, § 1; N.H. Rev. Stat. Ann. ch. 607, § 607-A:2; N.J. Const. art. II, § I; N.Y. Const. art. II, § 3; N.M. Stat. Ann. ch. 31, art. 13, § 31-13-1; N.C. Const. art. VI, § 2; N.C. Const. art. VI, § 8; N.C. Gen. Stat. § 13-1; N.C. Gen. Stat. ch. 163, § 163-55; N.D. Const. art. II, § 2; N.D. Cent. Code tit. 12.1, ch. 12.1-33, § 12.1-33-01; Ohio Rev. Code Ann. tit. XXIX, ch. 2961, § 2961.01; Okla. Stat. Ann. tit. 26, § 4-101; Or. Const. art. II, § 3; Or. Rev. Stat. § 137.281; Pa. Con. Stat. Ann. tit. 25, § 1301; Pa. Election Code § 102(w), art. I, § 2602; R.I. Const. art. II, § 1; S.C. Code Ann. § 7-5-120; S.D. Const. § 2; Tenn. Const. art. IV, § 2; Tenn. Code Ann. § 40-20-112; Tex. Const. art. VI, § 1; Tex. Elec. Code Ann. § 11.002(4); Utah Const. art. IV, § 6; Va. Const. art. II, § 1; Va. Code Ann. § 24.2-409; Va. Code Ann. § 24.2-418; Va. Code Ann. § 24.2-427; W. Va. Const. art. IV, § 1; Wis. Stat. Ann. § 6.03(1)(b); Wyo. Stat. tit. 22, ch. 1, § 22-1-102. The text of these constitutional and

history, felon disenfranchisement has been the norm; states allowing felons to vote has been the exception. *See Developments in the Law:One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942 (2002). As a result of the widespread use of felon disenfranchisement, the question presented in this case will be important throughout the nation. Moreover, there is currently continuing litigation in the lower courts over the application of the Voting Rights Act to felon disenfranchisement. *See Simmons v. Secretary of the Commonwealth*, U.S.D.C. No. 01-11040-MLW (D. Mass); *Hayden v. Pataki*, U.S.D.C. No. 00-8586 (S.D.N.Y.); *NAACP v. Harvey*, N.J. Super. Ct. Ch. Div., UNN-C-4-04. Whether the Voting Rights Act applies to felon disenfranchisement is the fundamental first question. The Court should grant review to resolve it.

2. The second reason the question in this case is important is that it involves the critical relationship between the federal courts and the state criminal justice system. This Court has recognized, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). Consequently, federal court review of state criminal proceedings has been limited. "Federal courts hold no supervisory authority over state judicial proceedings and may intervene [in habeas corpus actions under 28 U.S.C. § 2254] only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455

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statutory provisions are set out in the Appendix starting at 101a.

U.S. 209, 221 (1982). The *Rooker-Feldman* doctrine prohibits federal judges from engaging in an impermissible appellate review of a state court judgment where it considers arguments that are inextricably intertwined in the merits of that judgment. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

Application of the Voting Rights Act to felon disenfranchisement rests uncomfortably along side this limited federal court review of state criminal proceedings. In effect, plaintiffs seek to use the VRA to obtain federal court review in broad and undefined fashion of state criminal justice systems under the "totality of the circumstances" test. The unintended intrusion into the state criminal justice system via the Voting Rights Act raises a substantial issue involving the relationship between the states and the federal government. This Court should grant review to resolve this issue.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request their petition for certiorari be granted.

Respectfully submitted.

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